Overview of Contract Requirements Imposed by Federal Law for Federally Funded Projects

OVERVIEW OF CONTRACT REQUIREMENTS IMPOSED BY FEDERAL LAW FOR FEDERALLY FUNDED PROJECTS

A. Federaly-Funded Projects

In order to ease the burden on states of complying with Federal agencies' differing rules regarding the award and management of grants and cooperative agreements, in 1987 the President directed Executive Branch grant-making agencies to issue a common grants management rule containing uniform government-wide terms and conditions applicable to financial assistance agreements with States and local governments." The U.S. DOT's implementation of this "Common Rule" is contained in 49 C.F.R.§ 18. The Common Rule states that it applies to all U.S. DOT grants and cooperative agreements to State Highway Agencies ("SHA") and local governments unless **a** specific statute directs otherwise, or unless an exemption has been granted.

The Common Rule provides that with respect to procurements using grant funds, SHAs are to expend and account for grant funds, like those in the Highway Trust Fund, according to their own laws and procedures? However, application of the Common Rule as codified in 49 C.F.R. is somewhat complicated because there are certain provisions that do not apply to projects funded under Title 23, and there are statutory provisions in Title 23 that apply to Federal-aid construction contracts and that override the Common Rule.

The following discussion briefly outlines the contracting requirements that 23 U.S.C. and 23 C.F.R. impose on an SHA entering into a construction contract for a Federal-aid highway with Federal Highway Trust Fund grant monies.

1. Civil Rights Act

23 C.F.R. § 200 sets forth guidelines for: (a) implementing the FHWA Title VI compliance program under Title VI of the Civil Rights Act of 1964 and related civil rights laws and regulations, and (b) conducting Title VI program compliance reviews relative to the Federal-aid highway program. A "Title VI Program" is a system of requirements developed to implement Title VI of the Civil Rights Act of 1964. The term also refers to the civil rights provisions of other Federal statutes to the extent that they prohibit discrimination on the grounds of race, color, sex, or national origin in programs receiving Federal financial assistance of the type subject to Title VI. Those

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1/ This Executive Branch guidance was amplified in OMB Circular A-102, "Grants and Cooperative Agreements With State and Local Governments," issued March 3, 1988.

2/ 49 C.F.R. § 18.20(a).

Federal statutes include Title VI of the Civil Rights Act of 1964;[3/] the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970;[4/] and Title VIII of the Civil Rights Act of 1968, amended in 1974.[5/]

Pursuant to 23 C.F.R. part 200, the SHA must make assurances that it will not exclude any person on the grounds of race, color, national origin, or sex from participation in any program for which the SHA has received Federal assistance. Section 200.9(b) sets forth a list of required state actions to ensure compliance with Title VI. These requirements include staffing a civil rights unit, development of procedures for processing and disposition of complaints, development of procedures for the collection of statistical data, development of a program to conduct Title VI reviews of program areas, annual reviews, pre-grant and post-grant approval reviews of state programs, and procedures to identify and eliminate discrimination and to resolve deficiencies.

23 C.F.R. §§ 230.109 et seq. provides procedures for the implementation of specific Equal Employment Opportunity Requirements, on-the-job training and supportive services. 23 C.F.R. §§ 230.201 et seq. prescribes similar requirements with regard to supporting minority, disadvantaged and women business enterprises. Form FHWA-1273 sets forth certain "Required Contract Provisions, Federal-Aid Construction Contracts" that implement the requirements of 23 C.F.R. §§ 200 Section II et seq. of that form provides nondiscrimination contract provisions that are applicable to all Federal-aid construction contracts and related subcontracts of $10,000 or more. Under those provisions generally, the contractor must follow certain Equal Employment Opportunity Standards, make all members of the contractor's staff cognizant of the contractor's EEO policy, adopt procedures to ensure that the EEO policy is followed, include in advertisements for employees a notation that the employer is an Equal Opportunity Employer, systematically and directly recruit from minority groups, ensure nondiscriminatory working conditions, investigate complaints, assist in increasing the skills of minority group and women employees, solicit subcontract bids from disadvantaged business enterprises and provide non-segregated facilities.

2. Davis-Bacon Act

Compliance with the Davis-Bacon Act[6/] is required by 23 U.S.C. § 113. That section provides in pertinent part that:

3/ 42 U.S.C. 2000(d-d4).

4/ 42 U.S.C. 4601-4655 (Pub. L. 91-646); see 49 C.F.R. part 25.

5/ 42 U.S.C. 3601-3619; 23 U.S.C. 109(h); 23 U.S.C. 324; see 23 C.F.R. § 200.5(p).

6/ 40 U.S.C. 276(a).

> The Secretary shall take such action as may be necessary to ensure that all laborers and mechanics employed by contractors or subcontractors on the construction work performed on **highway** projects on the Federal-aid highways authorized under the highway laws providing for the expenditure of Federal funds upon the Federal-aid systems, shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with the Act of March 3, 1931, known as the Davis-Bacon Act (40 U.S.C. 276(a). (23 U.S.C. § 113.)

Section IV.1 .a. of FHWA form 1273 requires that for Federal-aid construction contracts exceeding $2,000, and for all related subcontracts, all mechanics and laborers employed or working upon the project must be paid wage rates not less than those contained in the wage determination of the Secretary of Labor (the "Wage Determination"). The Wage Determination is to be made in accordance with the Davis-Bacon Act. Subparagraph c provides that all rulings and interpretations of the Davis-Bacon Act and related acts contained in 29 C.F.R. parts 1, 3 and 5 are incorporated by reference in the construction contract.

3. Brooks Act and Requirements for Competitive Procurement Procedures

Specific Federal requirements for the letting of Federal-aid highway construction contracts are set forth in 23 U.S.C. § 112. Section 112(a) requires that where the construction is to be performed by the State highway department or under its supervision, a request for the submission of bids shall be made by advertisement unless some other method is approved by the Secretary, and the Secretary shall require such methods of bidding as shall be "effective in securing competition." 23 C.F.R. § 635104(a) provides that the actual construction contract shall be awarded by competitive bidding, unless the SHA demonstrates to the satisfaction of the FHWA's Division Administrator that some other method is more cost effective or that an emergency exists.[7/]

With respect to contracts for engineering and design services, the general rule is that such contracts are to be awarded in the same manner as a contract for architectural and engineering services is negotiated under Title IX of the Federal Property and Administrative Services Act of 1949 (the "Brooks Act") or equivalent State qualifications-based requirements. Pursuant to 23 U.S.C. § 112(b)(2)(B), if a state has adopted by statute a formal procedure for the procurement of such services, the state is

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7/ 23 U.S.C. § 112(b)(2).

to follow that procedure." The new Federal Design-Build Selection Procedures enacted by Pub. L, 104-106, amend Title III of the Brooks Act, and apply to direct Federal contracts, not SHA contracts with Federal funds. The new law did not amend any of the rules applicable to Federal-aid contracts.

Thus, design/build is not permitted for interstate highway projects undertaken by SHAs with Federal funds unless the method is approved by the Division Administrator. The FHWA is authorizing design/build contracts on Federal-aid projects under Special Experimental Project Number 14. Under this project, the Division Administrator will closely review the SHA'S procurement procedures to determine whether or not they promote competition.

4. Site Conditions. Suspension of Work and Changes in the Scope

23 USC. § 112(e) requires standardized contract clauses concerning site conditions, suspension of work, and material changes in the scope of the work for highway construction contracts. Pursuant to that section, the Secretary of the U.S. DOT is required to issue regulations establishing and requiring, for inclusion in each contract entered into with respect to any project approved under 23 U.S.C. § 106, contract clauses addressing site conditions, suspension of work ordered by the SHA (other than a suspension of work caused by the fault of the contractor or by weather), and material changes in the scope of work specified in the contract. The Federal clauses must be used unless the State adopts, or has adopted by statute, a formal procedure for the development of such contract clauses, or adopts or has adopted a statute which does not permit inclusion of such contract clauses.

(a) Site Conditions. Differing site conditions are covered by 23 C.F.R. § 635109(a)(l). That section provides that if, during the progress of work, subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract, or if unknown physical conditions of an unusual nature differing materially from those ordinarily encountered are discovered, then the party discovering such conditions must promptly notify the other party in writing. The engineer will then investigate the condition and determine whether the conditions materially differing cause an increase or decrease in the cost or time required for performance of any work under the contract, and make an adjustment in the contract price, excluding anticipated profits.

(b) Suspension of Work. 23 C.F.R. § 635109(a)(2) provides that if the performance of all or any portion of the work is suspended or delayed by the engineer for an unreasonable period of time, the contractor may request additional compensation or contract time. The engineer will evaluate the contractor's request and

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8/ 23 U.S.C. § 112(b)(2)(A).

if the engineer determines that the cost or time required to perform has increased as a result of such suspension, and the suspension was caused by conditions beyond the control of and not the fault of the contractor, its suppliers or subcontractors at any approved tier, and not caused by the weather, the engineer will make an adjustment in the contract.

(c) Changes. Significant changes in the character of the work are covered by 23 C.F.R. § 635.110. Pursuant to that section, the engineer reserves the right to make, in writing, at any time during the work, such changes in quantities and alterations in the work as are necessary to satisfactorily complete the project. Once such alterations or changes are in themselves significant changes to the character of the work or cause the work to become significantly different in character, an adjustment, excluding anticipated profit, will be made to the contract.

5. Buy America Provisions

Section 165 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 1601, § 337 of the Surface Transportation and Uniform Relocation Assistance Act of 1987, and 49 C.F.R. parts 660 and 661 impose Buy America provisions on the procurement of foreign products and materials.

No Federal-aid highway construction project may be authorized for advertisement or otherwise authorized to proceed unless: (1) the project either (i) includes no permanently incorporated steel or iron materials, or (ii) if such materials are to be used, all manufacturing processes, including application of coding for these materials, must occur in the United States; or (2) the state has standard contract provisions that require the use of domestic materials and products, including steel and iron materials, to the same or greater extent as provisions set forth in 23 C.F.R. § 635.410; or (3) the state elects to include alternate bid provisions for foreign and domestic steel and iron materials, and a bid document clearly states that the contract will be awarded to the bidder who submits the lowest total bid based on furnishing domestic steel and iron materials unless such total bid exceeds the lowest total bid based on furnishing foreign materials by more than 25%; or (4) only a minimum use of foreign steel and iron materials will be made, with a total cost not exceeding one-tenth of one percent of the total contract cost, or $2,500, whichever is greater.

A State may request a waiver from the Buy America requirements under certain circumstances.

6. Record of Materials, Supplies and Labor

FHWA Form 1273 Section VI sets forth contract provisions requiring the contractor to familiarize itself with Form FHWA-47 “Statement of Materials and Labor Used by Contractor of Highway Construction Involving Federal Funds,” to maintain records of the total cost and quantities of all materials and supplies in the project, and

furnish data and reports to FHWA. This requirement applies to all Federal-aid contracts on the NHS, except those which (a) provide solely for the installation of protective devices at railroad crossings; (b) are constructed on a force account or direct labor basis; (c) are highway beautification contracts, and (d) the total final construction cost for roadway and bridge is less than $1 ,000,000.

7. Subletting or Assigning the Contract

23 C.F.R. § 635.116 provides that Federal-aid project contracts must specify the minimum percentage of work that a contractor must perform with its own organization, which may not be less than 30% of the original contract price, excluding any identified specialty items. Specialty items may be performed by subcontractors, and the amount of specialty items so performed may be deducted from the total original contract before computing the amount of work required to be performed by the contractor's own organization.

The phrase "its own organization" is intended to refer to workers employed and paid directly by the prime contractor and equipment owned or rented by the prime contractor, with or without operators. Such a term does not include employees or equipment of a subcontractor, assignee or agent of the prime contractor.

"Specialty items" means work that requires highly specialized knowledge, abilities, or equipment not ordinarily available in the type of contracting organizations qualified and expected to bid on the contract as a whole, and in general are limited to minor components of the overall contract.

The contract amount upon which the 30% is computed includes the costs of material and manufactured products which are to be purchased or produced by the contractor under the contract provisions.

The SHA is required to ensure that: the contract furnishes (a) a competent superintendent or supervisor who is employed by the firm, has full authority to direct the performance of work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work), and (b) such other of its own organizational resources (supervision, management and engineering services) as the SHA contracting officer determines is necessary to ensure the performance of the contract.

Unless the written consent of the SHA contracting officer is obtained, no portion of the contract may be sublet, assigned or otherwise disposed of, and such consent when given is not construed to relieve the contractor of any responsibility for the fulfillment of the contract.

8. **Safety and Accident Prevention**

23 C.F.R. § 635.116 also provides that the SHA must include provisions in Federal-aid prime contracts requiring that the contractor comply with all applicable Federal, State, and local laws governing safety, health and sanitation. The contractor must provide all safeguards, safety devices and protective equipment and take any other needed action as it determines, or as the SHA contracting officer determines reasonably necessary to protect the life and health of employees on the job and the safety of the public, and to protect property in connection with the performance of the work covered by the contract.

The SHA is required to condition the contract, and make sure the contractor makes it a condition of each subcontract, that the contractor and any subcontractors shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous or dangerous as determined under construction safety and health standards promulgated by the Secretary of Labor, in accordance with § 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. § 333).

The contract must also provide that, pursuant to 29 C.F.R. § 1926.3, the Secretary of Labor or authorized representative thereof, shall have the right of entry to any site of contract performance to inspect or investigate compliance with § 107 of the Contract Work Hours and Safety Standards Act.

9. Clean Air Act and Federal Water Pollution Control Act

All Federal-aid construction contracts and related subcontracts of $100,000 or more require the contractor, or subcontractor, as appropriate, to stipulate that any facility that is or will be utilized in the performance of the contract, unless the contract is exempt under the Clean Air Act and under the Federal Water Pollution Control Act, is not listed, on the date of contract award, on the U.S. Environmental Protection Agency List of Violating Facilities pursuant to 40 C.F.R. § 15.20.

The firm must further agree to comply and remain in compliance with all requirements of § 114 of the Clean Air Act and § 308 of the Federal Water Pollution Control Act and all regulations and guidelines listed thereunder. The firm must promptly notify the SHA of the receipt of any communication from the Director, Office of Federal Activities, Environmental Protection Agency (EPA), indicating that a facility that is or will be utilized for the contract is under consideration to be listed on the EPA List of Violating Facilities, and the firm must agree to include or cause to be included these requirements in any non-exempt subcontract, and take such actions that the government may direct as a means of enforcing such requirements.

10. Certification Regarding Debarment. Suspension Ineligibility and Voluntary Exclusion

In all Federal-aid contracts, a participant must certify that it is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency; that it has not within a three-year period preceding the proposal been convicted of or had a civil judgment rendered against it for commission of fraud or criminal offense in connection with a public transaction, violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements or receiving stolen property; that it is not presently indicted or otherwise criminally or civilly charged with any such offenses; and that it has not within the three-year period preceding the application had one or more public transactions terminated for cause or default. The participant shall not knowingly enter into a lower-tiered transaction with any party that cannot also make such certification.

11. Certification Regarding Use of Contract Funds for Lobbying

With respect to all construction contracts and subcontracts which exceed $100,000, 49 C.F.R. § 20 requires the participant to certify that, to the best of his or her knowledge and belief, no Federal appropriated funds have been paid or will be paid for purposes of influencing the award of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the continuation, renewal, amendment or modification of any Federal contract, grant, loan, or cooperative agreement. If any funds other than Federal appropriated funds have been paid for such purpose, the participant must execute a "Disclosure Form to Report Lobbying." The participant also agrees that by submitting the bid proposal they must require such certification to be made in all lower-tier subcontracts.

12. Intellectual Property

In general, the Federal government requires that it be granted an irrevocable, paid-up, nonexclusive license in any intellectual property (patents, copyrights or data) created under a contract with a Federal funding component.

13. Limitations on Warranty Clauses

23 C.F.R. § 635.413 provides that SHAs may include warranty provisions in National Highway System (NHS) construction contracts for a specific construction product or feature. Items of maintenance that are not eligible for Federal participation shall not be covered. All warranty requirements and subsequent revisions must be submitted to the Division Administrator for advance approval, and no such requirement may be approved if, in the Division Administrator's judgment, it places an undue obligation on the contractor for items over which the contractor has not control.

B. Federal Requirements in Absence of Federal Funds

All construction projects on Federal-aid highways must comply with Federal design and engineering requirements and other applicable Federal laws regarding the physical road itself, such as environmental laws. Additionally, § 324 of Title 23 U.S.C., the Civil Rights Act of 1964, and 23 C.F.R. are applicable to all construction contracts awarded by SHAs on NHS highways.[9/] The contracting requirements in Title 23 do not apply in the absence of Federal funds, but physical requirements do apply.

9/ 23 C.F.R. § 633, Subpt. B., App. B.